In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-884

MAX J. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of having assaulted agents of the Federal Bureau of Investigation who were executing a search warrant, in violation of 18 U.S.C. 2231. He was sentenced to six months' imprisonment. The court of appeals affirmed without opinion.

At about 2:45 p.m. on January 1, 1972, three agents of the Federal Bureau of Investigation and a Connecticut state trooper went to an apartment in Bridgeport, Connecticut, for the purpose of executing a search warrant for gambling paraphernalia at the apartment, then rented to a Dolores Lambert (Tr. 8,

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26–27, 29, 34). At the apartment building, the four officers went to the superintendent's office and from there went with the superintendent to Mrs. Lambert's sixth floor apartment (Tr. 7, 29, 53, 67). When the superintendent, Charles Pinchot, rang the door bell, petitioner called from inside asking who was there. Pinchot stated that it was "Charlie." After a pause, petitioner told Mrs. Lambert that Charlie was at the door, but did not open the door. After a second request, the door opened (Tr. 9). Pinchot then stepped aside and agent Stonko, who was wearing his badge on the lapel of his coat, immediately identified himself to petitioner as an agent of the Federal Bureau of Investigation and told petitioner that he had a search warrant for Mrs. Lambert's apartment (Tr. 10, 30, 54, 69, 87).

As soon as Stonko had identified himself and his purpose, petitioner began to close the door by placing the weight of his body against the door. Agents Stonko and McGorray lunged against the door in order to keep it open and after a brief struggle, the door suddenly flew open. Thereupon, petitioner came charging out in a crouched position with his clenched fists and elbows in front of him. Petitioner grabbed at the search warrant in Stonko's hand as he "crashed" into Stonko and McGorray, knocking them out of the doorway and into the hallway, cutting Stonko's hand. As petitioner passed by Stonko and McGorray he ran into agent Long and trooper Maloney with whom he struggled for about thirty seconds before they were able

to subdue him (Tr. 31–33, 54–55, 69–71, 88–89). Petitioner was then taken back into Mrs. Lambert's apartment and the search was conducted (Tr. 56, 71, 89).

As part of his instructions, the trial judge read the statute (18 U.S.C. 2231) and the indictment (2 Tr. 27–28). He told the jury that F.B.I. agents were empowered to make seizures under warrants (18 U.S.C. 3107) and that, in certain circumstances, an officer executing a warrant could break a door (18 U.S.C. 3109). He instructed the jury that in order to find the defendant guilty, the government must prove beyond a reasonable doubt the following two elements (2 Tr. 29):

> One, that the defendant, Max J. Gordon, on January 1, of this year, forcibly assaulted, resisted, or opposed, or impeded, or intimidated, or interfered with any or all of the three Federal Agents named in the indictment. That is Edward Stonko, Thomas McGorray and William Long. Two, at the time the agent, or agents was, or were, engaged in the performance of his, or their, official duties, but bear in mind that it is for you to note that the person or persons that he allegedly assaulted or impeded was, or were, Federal officers.

Petitioner's sole contention is that 18 U.S.C. 2231 requires an intent to oppose, impede or interfere with the search rather than with the agents themselves. He argues that there was no showing here that he intended to impede the search, and that the trial judge erred in failing to instruct the jury on this

element of the offense. This contention is without merit.

Section 2231 makes it a crime forcibly to assault, resist, or impede any person authorized to execute search warrants "while engaged in the performance of his duties with regard thereto * * *." It is not necessary that in making the assault petitioner had the specific intent to impede or obstruct the execution of the search warrant. See *Bray* v. *United States*, 289 Fed. 329, 331 (C.A. 4), which so interpreted a statutory forerunner of the instant statute. The words "with regard thereto" do not, as petitioner contends, require a different result. The phrase merely denotes that the assault must occur while the officer is engaged in attempting to execute the warrant, not that the purpose of the assault is to prevent service or execution of the warrant. See *United States* v. *Lombardozzi*, 335 F. 2d 414 (C.A. 2), certiorari denied, 379 U.S. 914; *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2), so construing 18 U.S.C. 111, which makes it an offense to assault or impede certain designated officials "while [they are] engaged in or on account of the performance of [their] official duties * * *." The difference in wording between 18 U.S.C. 111 and 18 U.S.C. 2231 plainly does not, as petitioner argues, suggest any substantial difference in the meaning of the two statutes, and petitioner is unable to cite anything in the legislative history of the statutes to support his claim.

The trial court, therefore, properly tracked the statute and required the jury to find that appellant assaulted, resisted or impeded the officers executing

the warrant, "while [they were] engaged in the performance of [their] duties with regard thereto * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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